STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2008
v	No. 273050 Wayne Circuit Court
EMILIO HERNANDEZ-PEREZ, Defendant-Appellant.	LC No. 06-005320-01

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his conviction of first-degree home invasion, MCL 750.110a(2), for which he was sentenced to two years' probation. For the reasons set forth more fully herein, we affirm.

The fact giving rise to this case began on March 31, 2006, around 10:00 or 11:00 a.m., when Bernardo Reyes was in the living room of his home and two men about 5'5" or 5'6" tall, with blue bandanas covering their faces just below their eyes, tore down his door and entered his home pointing a pistol at him. After they left, Reyes came out of the bathroom and discovered that, in addition to two of his bags, a camera, money, and jewelry were missing. On the same date and roughly at about the same time, Jesus Haro was working in his yard located on Florida Street when some "young men came by and said that someone had broken into a house." About 10 to 30 minutes later, Haro observed a Hispanic man and woman whom were short and thin, the woman had a bag on her shoulder, they were in an alley with a stereo on the ground in front of the man. According to Haro, the man took out a gun and began shooting at him and three other individuals that were with him. Although no one was shot, the sound of gunfire caused police to come to the location, when they arrived they eventually arrested Ricardo Rodriguez. During the course of their interviews with Rodriguez, it was learned that defendant was also involved in the robberies. Defendant was arrested four days following the robbery and gave the police a statement concerning the incident. Defendant indicated in his statement that he was on Florida Street in the morning with some others who wanted him to break into a house and rob it with them. According to his statement, defendant drove himself, and two others to the house on Florida where they parked one street over and talked about how they were going to break into the house. According to defendant, he did not know "what was going on" until they started driving. At some point during the discussion of the robbery and after defendant had seen one of his passengers with a black revolver, defendant told his companions that he did not "want to do this anymore," got scared, walked down the alley, and got inside his car and drove to work. After

giving a statement to police, defendant was identified by the victim in a line-up as one of the perpetrators and as the individual who pointed the gun during the incident. Three days later, at the preliminary examination however, Reyes identified Rodriguez as the person possessing the gun, admitting that he may have been confused about which man had the gun, but was confident that defendant was one of the perpetrators.

Defendant first claims that the trial court's failure to instruct the jury on the defense of voluntary abandonment warrants reversal because it infringed on his right to present a defense and violated his right to a fair trial. Defendant, however, affirmatively waived any claim of instructional error when he specifically indicated to the trial court that he had no objections to the instructions as given. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

Defendant then argues, in the alternative, that defense counsel's failure to request instruction on voluntary abandonment or to object to the allegedly deficient instructions, denied defendant the effective assistance of counsel. "In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different." *Ortiz*, *supra* at 311. Our review is limited to the lower court record because no *Ginther*[1] hearing occurred. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Voluntary abandonment has been generally recognized as a defense to *criminal attempt* if the evidence supports such a defense. *Cross*, *supra* at 206-207 (attempted prison escape); *People v Stapf*, 155 Mich App 491, 495-496; 400 NW2d 656 (1986) (attempted kidnapping); *People v McNeal*, 152 Mich App 404, 414-415; 393 NW2d 907 (1986) (attempted criminal sexual conduct); *People v Kimball*, 109 Mich App 273, 286-287; 311 NW2d 343, mod on other grounds 412 Mich 890, 891 (1981) (attempted unarmed robbery). In *Kimball*, *supra*, following an in-depth discussion and analysis regarding whether to recognize voluntary abandonment as a defense to an attempted robbery, this Court held:

> [The] issue presented is one of first impression in this state. We are persuaded by the trend of modern authority and hold that voluntary abandonment is an affirmative defense to a prosecution for criminal attempt. The burden is on the defendant to establish by a preponderance of the evidence that he or she has voluntarily and completely abandoned his or her criminal purpose. Abandonment is not "voluntary" when the defendant fails to complete the attempted crime because of unanticipated difficulties, unexpected resistance, or circumstances which increase the probability of detention or apprehension. Nor is the abandonment "voluntary" when the defendant fails to consummate the attempted offense after deciding to postpone the criminal conduct until another time or to substitute another victim or another but similar objective. Such a holding is not at

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

> odds with the terms of the statute, which refer to one who "fails," is "prevented," or is "intercepted" before completion of the attempted offense. Such language lends itself to a holding that voluntary abandonment is a defense.
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> We are persuaded…that the defense of voluntary abandonment is in accord with the rationale of the law of attempts and that the defendant is entitled to present such a defense. [*Kimball, supra* at 286-287 (citations omitted).]

Voluntary abandonment, therefore, is clearly available in defense to a *criminal attempt* if factually supported by the evidence. *McDaniel, supra* at 169-170 ("The trial court is required to give a defendant's requested instruction when the instruction concerns his theory and is supported by the evidence.")

In the instant case, however, defendant was charged with completed offenses, i.e., first-degree home invasion as a principal and as an aider and abettor. He was not charged with criminal attempt, nor did the evidence presented support a charge of attempted home invasion. To the contrary, it was undisputed that the home invasion was, in fact, completed. In his defense, it is apparent that defendant claimed that (1) the complainant misidentified him as one of the perpetrators in the home and (2) after participating in planning the break-in, driving the alleged co-perpetrators to the scene knowing they intended to break-in, and approaching complainant's home, defendant "got scared," stated he "didn't want to do this anymore," and left the scene before the crime was committed. The evidence, therefore, clearly did not support attempted home invasion, but supported a charge of first-degree home invasion as a principal and as an aider and abettor.

In light of *Kimball, supra*, which clearly recognizes voluntary abandonment as a defense only to criminal attempt, voluntary abandonment was not an available defense in this case because defendant was charged with a completed crime versus an attempt. Defendant did not cite to this Court any case law expanding the applicability of a voluntary abandonment defense beyond criminal attempt.[2] Considering the lack of case law recognizing abandonment as a valid defense, except in criminal attempts, it cannot be said that defense counsel had a duty to request such instruction or that his conduct in failing to do so or to object to the instructions *as given* did not fall below an objective standard of reasonableness. *Ortiz, supra* at 311. The trial court is obligated to instruct regarding a requested defense only where there is some evidence to support giving that instruction. *Cross, supra* at 206. Here, voluntary abandonment was not an available defense to the offense of aiding and abetting a completed crime, and thus, the evidence could not have supported it. Consequently, defense counsel had no duty to request a jury instruction to which defendant was not entitled and therefore we conclude that defense counsel's conduct in failing to affirmatively request instruction or to object to the instructions as given did not fall

[2] We do note that in his brief defendant cites case law from other jurisdictions on this matter which we find unpersuasive.

below an objective standard of reasonableness, *Ortiz*, *supra* at 311, and defendant cannot prevail on his claim of ineffective assistance of counsel.

Defendant next claims that he was denied a fair trial by the prosecutor's remarks in closing argument that the jury could determine witness credibility based on a preponderance of the evidence. Defendant failed to object to the alleged improper argument, and thus this issue was not preserved for review by this Court. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). We review unpreserved issues for plain error affecting defendant's substantial rights. *Id*. We review issues of prosecutorial misconduct on a case-by-case basis, examining the record and evaluating the remarks in context and in light of defendant's argument. *Id*.

The alleged improper remarks made by the prosecutor during his rebuttal argument, are as follows:

> And we talked about credibility. Credibility is not a standard beyond a reasonable doubt. It's just whether you believe someone or not. Preponderance of the evidence. I believe him. I believe her. That's all credibility is. People sitting down they try to find evidence beyond a reasonable doubt credibility. Well, it doesn't apply.
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> Beyond a reasonable doubt. Credibility. No he didn't have a gun. More likely than the Defendant didn't have a gun. I'm not arguing that. I told you in the beginning that Mr. Rodriguez had the gun.

We fail to find any impropriety in the prosecutor's remarks. Viewing the remarks in context, they do not suggest that the prosecutor was attempting to mischaracterize the burden of proof required to establish guilt. Instead, the prosecutor was merely arguing in response to defense counsel's argument that the complainant's identification was not reliable and could not be believed to establish guilt beyond a reasonable doubt. Furthermore, jurors are presumed to follow the trial court's instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and any impropriety in the prosecutor's argument was cured by the trial court's instructions regarding the prosecutor's burden of proof and the jury's role in weighing the testimony of the witnesses and deciding the case based only on the evidence. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). On this record, we cannot say that the allegedly improper remarks affected defendant's substantial rights or that he was denied a fair trial. *Thomas*, *supra* at 453-454. Accordingly review of this issue is forfeited. *Id.*

Defendant finally claims that the references during police testimony to an alleged co-perpetrator's police statement violated his constitutional right of confrontation. Defendant did not object to the challenged testimony, and thus this issue was not preserved for review by this Court. *People v Chambers*, ___ Mich App ___, ___; ___ NW2d ___ (2007). Accordingly, this Court's review is limited to plain error affecting defendant's substantial rights. *Id.*, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"A defendant has the right to be confronted with the witnesses against him." *Id.*, citing US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *Id.*, citing *Crawford*, *supra* at 68. "However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.*, citing *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004). "[A] statement offered to show why police officers acted as they did is not hearsay." *Id.*, citing *People v Jackson*, 113 Mich App 620, 624; 318 NW2d 495 (1982).

In the instant case, defendant cites two specific instances where police testimony allegedly denied him his constitutional right of confrontation by referencing a police statement made by his alleged co-perpetrator, Rodriguez. The first instance occurred during questioning of a police officer by the prosecution, as follows:

> Q: [Prosecutor]: In that capacity did you have reason to investigate a matter concerning [defendant]?
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> A: [Officer Drury]: Yes.
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> Q: [Prosecutor]: What promoted that investigation?
>
> A: [Officer Drury]: A previous arrest.
>
> Q: [Prosecutor]: Of a Mr. Ricardo Rodriguez?
>
> A: [Officer Drury]: Yes.
>
> Q: [Prosecutor]: Did you reason [sic] any information from Mr. Rodriguez?
>
> A: [Officer Drury]: Yes, we did.
>
> Q: [Prosecutor]: And that led you to [defendant]?
>
> A: [Officer Drury]: Yes, it did.

The challenged testimony did not violate defendant's constitutional right of confrontation. First and foremost, Rodriguez's statement to police was never admitted into evidence and the challenged testimony did not disclose the contents of that statement. Instead, the challenged testimony, which revealed that Rodriguez provided information prompting the police to apprehend defendant, was offered to explain why the police pursued defendant as a suspect. Viewing the challenged testimony in context, it is apparent that it was not introduced as substantive evidence that defendant committed the crime or to prove the truth of Rodriguez's statement, but was offered to show why the police acted as they did. *Chambers*, *supra*, ___ Mich App ___, slip op at p 6. "Because the Confrontation Clause does not bar the use of out-of-

court testimonial statements for purposes other than establishing the truth of the matter asserted, the testimony did not violate defendant's right of confrontation." *Id.* Accordingly, there was no plain error affecting defendant's substantial rights. *Id.*[3] The existence of Rodriguez's statement in this context, the contents of which were not disclosed to the jury, was not incriminating or damaging, and thus, did not prejudice defendant.

Second, defendant claims that the following police testimony in response to questioning by defense counsel violated his constitutional right to confrontation:

> Q: [Defense Counsel]: And up until April 4 no one had said in writing that my client was involved, correct? No identifications, no lineup, no nothing, correct?
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> A: [Officer Sims]: April 4?
>
> Q: [Defense Counsel]: Yes. Up until that point in time, correct?
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> A: [Officer Sims]: Correct. Wait. Wait. I'm sorry. Can you repeat that question?
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> Q: [Defense Counsel]: Up until April 4 no one said [defendant] was involved in this, I observed him in writing. You don't have any statements like that.
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> A: [Officer Sims]: I have a statement from co-defendant, sir.
>
> Q: [Defense Counsel]: I don't know and I never seen it, Judge. So, can we have a break so I can discuss this, Judge.
>
> A: [The Court]. No, keep moving.

This testimony more directly implicates defendant as it indicates that Rodriguez did provide a police statement indicating that defendant was "involved in this." However, defense counsel elicited the testimony during his line of questioning concerning why defendant was not arrested until four to five days after the crime occurred. As such, defendant cannot now claim error. *McPherson*, *supra* at 139, citing *People v Jones*, 468 Mich 345, 352; 662 NW2d 376 (2003) ("Under the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly causes the error.") Regardless, again reviewing the testimony in context, it was apparent that it was offered to show the basis for defendant's apprehension and not introduced as substantive evidence that defendant committed the crime. Accordingly, the testimony did not violate defendant's right of confrontation and no plain error occurred. *Chambers*, *supra*, ___ Mich App ___, slip op at p 6. Furthermore, the testimony did not indicate how, or to what extent, defendant was "involved in this." Defendant's own statement indicates that he was initially involved, i.e., in planning the break-in, transporting the

[3] Furthermore, any alleged prejudice was minimized by defense counsel's subsequent questioning of the officer revealing that they [the parties] did not know what was contained in Rodriguez's statement.

co-perpetrators to the complainant's house, and, walking to the house, but that he left before the home invasion was completed. Because defendant's own statement tends to show that he was initially involved, and the jury was clearly aware of Rodriguez's existence through testimony elicited by defense counsel and the prosecutor and in argument before the jury, it cannot be said that defendant was prejudiced by testimony indicating that Rodriguez somehow implicated him in the crime. Therefore, viewing the challenged testimony in context, it is apparent that it was not introduced as substantive evidence that defendant committed the crime or to prove the truth of the co-perpetrator's statement, but was offered to show why the police pursued defendant as a suspect and the basis for his apprehension.[4] Therefore, the challenged testimony did not violate defendant's right of confrontation. Accordingly, we find no plain error that affected defendant's substantial rights.

Affirmed.

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

[4] The co-perpetrator's statement to police was never admitted into evidence and the challenged testimony did not disclose the contents of that statement.